BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF **GLOBAL NAPS, INC.** **COMPLAINANT,** **V.** **VERIZON COMMUNICATIONS, VERIZON NEW ENGLAND INC., VERIZON VIRGINIA INC.,** **DEFENDANTS.**	**FILE NO. _____**

FORMAL COMPLAINT

GLOBAL NAPS, INC.

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DATED: APRIL 27, 2001

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IN THE MATTER OF **GLOBAL NAPS, INC.** **COMPLAINANT,** **V.** **VERIZON COMMUNICATIONS, VERIZON NEW ENGLAND INC., VERIZON VIRGINIA INC.,** **DEFENDANTS.**	**FILE NO. _____**

TO: THE COMMISSION

FORMAL COMPLAINT

1. Pursuant to Sections 4(i), 201(b), 206, 207 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201(b), 206, 207, and 208, and Section 1.720 *et seq.* of the Commission's Rules, Global NAPs, Inc. ("Global NAPs") files the following Complaint against Verizon Communications, Verizon New England Inc. and Verizon Virginia Inc. (collectively, "Verizon") for violation of 47 U.S.C. § 201(b) and the Commission's Order providing conditions for the merger between Bell Atlantic Corp. and GTE (the "Merger Order").[1] The Commission has jurisdiction pursuant to Section 208 of the Act because Verizon has violated these conditions, conduct which constitutes an action "done or omitted to be done by [a] common carrier subject to this Act, in contravention of the provisions thereof."

[1] Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd 14032 (released June 16, 2000) ("*Merger Order*").

I. PARTIES

2. Complainant Global NAPs is a corporation incorporated in Delaware and located at 10 Merrymount Road, Quincy, Massachusetts 02169. Its telephone number is (617) 507-5100. Global NAPs is a telecommunications carrier and a competing local exchange carrier ("CLEC") and offers interstate and intrastate telecommunications services under tariff and contract. Global NAPs and its affiliates have interconnection agreements with Verizon covering the provision of local telecommunications services in a number of states.

3. The Defendants are Verizon Communications (formerly Bell Atlantic Corporation), incorporated in Delaware and having its principal business address at 1095 Avenue of the Americas, New York, NY, 10036, and the main telephone number of (212) 395- 2121; Verizon New England, Inc. (formerly New England Telephone and Telegraph Company), incorporated in New York and having its principal business address at 185 Franklin St., Boston, Massachusetts, 02110, and the main telephone number of (617) 743-9800; and Verizon Virginia Inc. (formerly Bell Atlantic Virginia, Inc.), incorporated in Virginia and having its principal business address at 600 E. Main St., Richmond, VA, 23219, and the main telephone number of (804) 225-6300. Verizon provides a variety of interstate and intrastate telecommunications services under tariff and contract. Verizon is an incumbent local exchange carrier ("ILEC") in all of the states relevant here.

II. SUMMARY OF COMPLAINT: INTRODUCTION AND NATURE OF THE ACTION

4. Global NAPs has a dispute with Verizon regarding three legal issues under Paragraph 32 of the conditions that this Commission imposed on Verizon as part of the merger of GTE and Bell Atlantic (the "GTE Merger Conditions"):[2]

(a). Does the language stating that a CLEC may adopt an "entire agreement" from another state mean what it says?

(b) May Verizon rely on its right to resist adoption of certain "interconnection arrangements" and "UNEs" to block adoption of a provision that is neither an "interconnection arrangement" nor a "UNE"?

(c) May Verizon frustrate the purposes of Paragraph 32 by forcing CLECs to relitigate the settled meaning of adopted provisions?

5. The answer to each of these questions seems obvious:

(a) Paragraph 32 means what it says.

(b) Verizon may not object to the adoption of provisions that are not "interconnection arrangements" or "UNEs."

(c) Verizon may not force CLECs to relitigate the meaning of contract language whose meaning has already been litigated.

6. In violation of its obligations under Paragraph 32, Verizon disputes each of these answers. It does so for a quite practical (if legally indefensible) reason: accepting the correct

[2] Appendix D to the *Merger Order*, Market Opening Conditions ("GTE Merger Conditions"), 15 FCC Rcd. at 14258.

….Continued

answers means that Verizon owes Global NAPs upwards of $26,000,000 for Verizon-originated traffic in Massachusetts and Virginia under the parties' fully-negotiated interconnection agreement from Rhode Island, which Global NAPs has adopted in those states pursuant to Paragraph 32. Global NAPs, therefore, has been and is being severely and directly damaged by Verizon's violation of its obligation under this Commission's order.

7. The ill effects of Verizon's obstinacy go beyond this individual dispute, however. The Commission found that the merger of Bell Atlantic and GTE would create competitive problems.[3] To offset these problems, Bell Atlantic and GTE agreed to abide by certain pro-competitive conditions.[4] Paragraph 32 (one of those conditions) gives CLECs expedited access to already-established interconnection terms from other states, thereby facilitating competition.

8. For precisely that reason, Verizon has every incentive to construe Paragraph 32 narrowly; and for precisely that reason, the Commission must be resolute in ensuring that CLECs — and the competitive local exchange marketplace — receive the benefit of Paragraph 32.

9. If Verizon prevails on any of the three issues presented here, it will have a regulatory road map leading to the prize of suppressing CLEC competition. Verizon wants to limit the scope of CLEC most-favored-nation (MFN) rights under Paragraph 32 to such an extent that CLECs can't effectively use that provision at all, and certainly not to export provisions that Verizon doesn't like. But MFN rights only matter when the CLEC can use them to adopt provisions that Verizon ***really, truly does not want to be adopted.*** Indeed, MFN "rights" are not even implicated if Verizon would willingly agree to the provisions a CLEC wants to adopt. An

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3 *See Merger Order* at ¶¶ 3, 96-208, 246.

4 *Merger Order* at ¶¶ 4, 246-375, and Appendix D.

MFN "right" is only a ***right*** — and Verizon's obligation under Paragraph 32 only an ***obligation*** — when it can be enforced as to provisions that Verizon now wishes it had never agreed to.

10. That, of course, is precisely the problem here.

11. In mid-1998, more than a year into the industry-wide dispute over the proper treatment of Internet Service Provider ("ISP")-bound calls for purposes of reciprocal compensation, Global NAPs and Verizon worked out a truce. The parties acknowledged that the issue was contentious. They acknowledged that they disagreed about it. They acknowledged that it was unresolved. And they adopted a rule for how to handle it: treat the traffic as local while the issue remains unresolved, then do what the regulators say, prospectively, when they finally resolve it.

12. The contract embodying the truce is a classic example of a voluntarily negotiated provision. It is perfectly lawful. It is generally reasonable. And Verizon now hates it. It therefore presents the perfect opportunity for this Commission to make clear to Verizon that Commission orders must be respected even when it hurts. Verizon's tortured efforts to escape this simple conclusion must be soundly rejected if Paragraph 32 — and, ultimately, any Commission order — is to have teeth.

13. The remainder of this Complaint lays out the facts surrounding this controversy (which Global NAPs suspects are not seriously in dispute); the three legal propositions that Verizon must negate in order to avoid its Paragraph 32 obligations to Global NAPs; Global NAPs' understanding of Verizon's views; and why those views are wrong.

14. In this latter regard, Global NAPs has been frustrated in its efforts to try to settle or narrow this dispute by Verizon's equivocal responses to Global NAPs' inquiries.[5] As the Commission (or at least Enforcement Bureau Staff) is aware, Verizon and Global NAPs engaged in extensive informal mediation regarding this dispute. Subsequent to that mediation, the Deputy Chief of the Common Carrier Bureau issued a letter eviscerating one of Verizon's key claims.[6] Verizon, however, not only refuses to acknowledge the force of the letter, but — in a remarkable case of regulatory denial — actually claims that it has acted in conformity with the views expressed in it.[7]

15. The upshot is that, while Global NAPs believes, based on the informal mediation, that it understands Verizon's positions, it may not. Global NAPs, therefore, respectfully requests a waiver for good cause, pursuant to 47 C.F.R. § 1.3, of the normal complaint case rules to permit Global NAPs to file a reply to Verizon's answer, to the extent that Verizon contests Global NAPs' characterization of Verizon's own position on the issues.[8] Otherwise, Global

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[5] Enforcement Bureau staff members have received contemporaneous copies of the email exchanges between counsel for Global NAPs and counsel for Verizon on this point, which speak for themselves. Global NAPs is attaching copies of those emails for easy reference here. *See* Exhibits 9-12.

[6] Letter from C. Mattey (CCB) to M. Shor (counsel for Focal) dated December 27, 2000 ("*Mattey Letter*"). *See* Exhibit 1. The analysis in this letter is subject to public comment. *See* note 28, *infra*.

[7] Verizon confirmed in a letter dated April 25, 2001, that it views have not changed since the next-most-recent correspondence. See letter from L. Katz to C. Savage dated April 25, 2001, Exhibit 19 hereto.

[8] *See* 47 C.F.R. § 1.726(a) (replies not normally permitted); 47 C.F.R. § 1.721(d) (permitting waivers in appropriate cases). One purpose of the Commission's complaint case rules is to establish a "fact-pleading" regime in which the entire case is set forth in the complaint and answer. That purpose is frustrated if a defendant is so evasive during pre-complaint discussions that the complainant cannot fully understand the basis for the defendant's refusal to obey its legal obligations, and so cannot fully set out its case in the complaint. If Global NAPs has not adequately understood and anticipated Verizon's views, a waiver permitting a reply here

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NAPs faces the real risk of being prejudiced in the presentation of its case as a result of Verizon's "hiding the ball" about its real views until too late in the game for Global NAPs to effectively respond.

III. FACTUAL BACKGROUND

16. Global NAPs began operations in Massachusetts in 1997. Its market entry strategy involves focusing on providing ISPs with connections to the public switched network. ISPs receive a lot of calls, so controversy erupted in the industry — including between Verizon and Global NAPs — about whether ISP-bound calls were subject to reciprocal compensation under Section 251(b)(5) of the Act and the Commission's associated rules.

17. By mid-1998, this issue had been raised before a number of state commissions, as well as this Commission. Indeed, by mid-1998, the matter had been pending before this Commission for a year. What direction this Commission would take was uncertain; but it was clear that states were generally resolving the matter contrary to Verizon's views.

18. It was during this uncertain time that Global NAPs was expanding its operations beyond its base in Massachusetts. Global NAPs undertook to negotiate a deal with Verizon that would apply in all of the old "NYNEX" states other than Massachusetts (where the parties already had an agreement). A main point of disagreement was how to handle ISP-bound calls.

19. The regulatory uncertainty created a good environment for compromise. In what Global NAPs views as sound recognition by Verizon that pressing the issue in state arbitrations was unwise, Verizon agreed that ISP-bound calls would be treated as local while the regulatory question was unresolved. In what Global NAPs viewed as a sensible acknowledgement on its

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would advance, not frustrate, the goal of the Commission's complaint case rules by ensuring that the matter is fully laid out by the pleadings.

part that the issue was contentious, it agreed to abide prospectively by whatever regulatory resolution was forthcoming, as opposed to insisting on a contract that definitely treated ISP-bound calls as local for its entire term. This compromise, embodied in Section 5.7.2.3 of each of the "clone" agreements for New York, Rhode Island, Maine, Vermont, and New Hampshire, provides as follows:

> The Parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider (ISP) connected to the other party's network (ISP Traffic) constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation mush be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The Parties agree that the decision of the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and charges to be assessed in connection with ISP Traffic. If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA agrees to pay GNAPS reciprocal compensation for ISP Traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue, pursuant to the commission's Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed, or reversed.)[9]

20. A few points are notable about this compromise language. First, while the parties obviously recognized that this Commission was pondering what to do about ISP-bound traffic, they also recognized that the courts would likely get involved.[10] Second — while the parties recognized that ISP-bound traffic might be subject to reciprocal compensation because such

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[9] Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 between Bell Atlantic-Rhode Island and Global NAPs, Inc. (October 1, 1998) ("*Rhode Island Agreement*") (attached hereto as Exhibit 2). The typographical errors above are in the original document.

[10] ISP-bound calls shall be treated as local traffic "unless another compensation scheme is required under such FCC ***or court*** determination."

traffic "is Local Traffic, as defined herein" — they also recognized that the "FCC or such court" might "***otherwise*** determine[] that ISP Traffic is subject to reciprocal compensation" — in which case compensation would still be due. Third, the parties recognized that the result might be that ISP-bound calls are not subject to "reciprocal compensation" as such at all, but are nonetheless subject to some other "compensation scheme."[11]

21. Finally, the agreement does not permit termination of Verizon's payment obligation based on the mere issuance of a regulatory order. Not only does the language expressly recognize the role of "court[s] of competent jurisdiction;" more pointedly, the operative phrase does not say, "until the FCC issues an order," or "until a state commission issues an order." It says, "[u]ntil ***resolution of this issue.***" If the "issue" remains unresolved, Verizon pays; if the "issue" is resolved in favor of compensation for ISP-bound calls, whether under a "reciprocal compensation" rubric or under "another compensation scheme," Verizon pays. The payment obligation only ends when the "issue" is "resolved" against payment.

22. The exegesis above is needed to understand Verizon's positions, discussed below. But Global NAPs emphasizes that it is ***not*** asking this Commission to interpret or construe the parties' interconnection agreement. This is because the Public Utilities Commission of Rhode Island, charged with that job, has already done so.

23. Within six months of the effective date of the agreement in Rhode Island — including the language above — this Commission issued its February 1999 ruling on ISP-bound calls.[12] That ruling said a number of things, including: (a) ISP-bound calls are not "local" for

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[11] The language expressly recognizes that "another compensation scheme" may be "required under such FCC or court determination."

[12] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling and Notice of* ….Continued

purposes of Section 251(b)(5), because they are interstate;[13] (b) if an ILEC agreed to pay for such calls as though they were local, that agreement stands;[14] (c) states, not this Commission, have to decide whether a payment obligation exists in any particular case under any particular contract;[15] and (d) even in the absence of an agreement, states may require compensation for such calls, either on an interim or permanent basis.[16]

24. Verizon seized on item (a) above to assert that the contingency in the parties' agreement ("Until this issue is resolved…") had been fulfilled, and stopped paying Global NAPs for ISP-bound calls. Global NAPs seized on items (b) through (d) above, along with a review of the actual language of the contract, to argue that properly interpreted, payment was still due, notwithstanding the *Reciprocal Compensation Ruling.*

25. In short, the parties had a garden-variety contract dispute. They had voluntarily agreed to certain language to govern their rights and obligations, but did not see eye to eye on how that agreed-to language applied as circumstances actually developed. Since the dispute involved an interconnection agreement, Global NAPs brought this matter to the Rhode Island PUC, which resolved it in late 1999.[17] That body ruled that the relevant condition ("Until this

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Proposed Rulemaking, 14 FCC Rcd. 3689 (1999) ("*Reciprocal Compensation Ruling*"), *vacated and remanded sub nom. Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000).

13 *Id.* at n.87

14 *Id., passim.*

15 *Id.* at, *e.g.*, ¶ 1.

16 *Id.* at ¶¶ 25-28.

17 The issue did not arise in New York because Verizon expressly sought permission from the New York PSC to cease paying CLECs for ISP-bound calls, which was denied; and in a subsequent proceeding that body ruled that payments should continue, albeit in some cases (not affecting Global NAPs) in a modified form. The issue did not arise in Massachusetts because the parties' prior Massachusetts agreement did not contain the relevant provision. The issue did not arise in Maine or Vermont because Global NAPs was not yet operational in those states, and so had no ISP-bound traffic as to which it had a right to payment. The issue ***did*** arise in New

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issue is resolved…") had not been fulfilled, so that Verizon's payment obligation continued unabated. Verizon did not appeal that decision; it paid Global NAPs the funds it had been withholding; and it continues to pay to this day.

26. Meanwhile, the proceedings leading to this Commission's approval of the creation of Verizon from Bell Atlantic and GTE were underway. Bell Atlantic and GTE announced the merger on July 28, 1998 (before the *Rhode Island Agreement* was even fully negotiated).[18] Approval proceedings at this Commission began shortly thereafter, in October 1998.[19] As it became clear that the merger would produce serious anticompetitive consequences, Bell Atlantic and GTE proposed a series of conditions to mitigate those consequences. The first set of conditions was formally submitted on January 27, 2000. These were supplemented during the first part of 2000, and the merger was eventually approved — with conditions — in an order issued on June 16, 2000.[20]

27. The Commission had jurisdiction over the proposed merger as a result of its obligation under Title III to review proposed transfers of licenses for the use of radio spectrum, and its obligation under Section 214 of Title II to review proposed transfers of international telecommunications authorizations.[21] Under the Commission's traditional approach — applied to this transaction — if there were potential anticompetitive concerns arising from the merger, it could refuse approval. On the other hand, the Commission could also pursue an alternate course:

Hampshire, and Global NAPs brought the matter to the attention of the New Hampshire commission. The parties settled that dispute in June/July 2000.

18 *Merger Order* at ¶ 13.

19 *See id.* at ¶ 1 & n.3 (citing application).

20 *Merger Order*.

21 *See id.* at ¶¶ 439-53. Note that this Title III authority (Sections 309 and 310, relating to spectrum), along with Section 214 from Title II (relating to international) were the sole ….Continued

mitigating anticompetitive concerns by imposing pro-competitive conditions on the merged entity.

28. The Commission has long recognized the pro-competitive benefits of allowing all CLECs "most favored nation" status with regard to contracts to which an ILEC is a party. This right is explicit, with respect to contracts within a given state, in Section 252(i) of the Act. The Commission has emphasized that one of the key pro-competitive values of Section 252(i) is that CLECs can move ***quickly*** to operate under an existing contract.[22] And, when states have dithered in resolving issues under Section 252(i), the Commission has not hesitated to emphasize that speed counts, and that delay itself is anticompetitive.[23]

29. In view of the expanded scope of Verizon's operations, as compared to either company's pre-merger activities, Paragraphs 32 and 33, in broad strokes, seek to provide the same benefits as Section 252(i), only more so. Paragraph 33, broadly speaking, says that any deal that Verizon agrees to after the merger in any state is available to all CLECs in all Verizon states. Paragraph 32 applies the same concept to pre-existing agreements, with the caveat that it only applies within each formerly separate company's territory. So under Paragraph 32 a pre-merger voluntary agreement with Verizon (former Bell Atlantic) in New York may be imported

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substantive statutory sections upon which the Commission purported to rely (that is, not counting Sections 4(i) and 4(j) of the Act).

[22] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*") at ¶¶ 1320-23.

[23] Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd. 12530 (1999) ("*New Jersey Section 252(i) Order"*) at ¶ 4.

for use with Verizon (former Bell Atlantic) in Maryland, but not for use with Verizon (former GTE) in California.

30. The basic obligation contained in Paragraph 32 is as follows:

> Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available[,] in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date … .

GTE Merger Conditions, ¶ 32. The remainder of Paragraph 32 consists of limitations and clarifications of the basic obligation stated above. These are discussed below.

31. On its face, this key language in Paragraph 32 allows Global NAPs to adopt the *Rhode Island Agreement* in Virginia and Massachusetts. Rhode Island, Virginia and Massachusetts are all part of the "Bell Atlantic Serving Area," *i.e.*, the portion of the country served by pre-merger Bell Atlantic.[24] Paragraph 32 expressly permits adoption of (a) an "interconnection arrangement;" (b) a "UNE;" or (c) "provisions of an interconnection agreement (including an entire agreement)." Here, Global NAPs has proceeded under option (c), expressly adopting "an entire agreement" from one state for use in another."[25]

32. Verizon nonetheless claims that the "entire" *Rhode Island Agreement* (and implicitly, any "entire" agreement) cannot be adopted anywhere. Its hangs this absurd claim on the phrase "subject to Section 251(c)" that follows the phrase "an interconnection agreement

[24] Parts of Virginia were served by pre-merger GTE. Global NAPs does not contend that it has adopted the *Rhode Island Agreement* with respect to those parts of Virginia.

[25] As far as Global NAPs is aware, Verizon does not dispute that the *Rhode Island Agreement* was completely "voluntarily negotiated" by Bell Atlantic "prior to the Merger Closing Date."

(including an entire agreement)." Verizon apparently thinks that the only "entire agreements" that might be adopted are "entire agreements" that relate only to the substantive matters addressed in Section 251(c). This claim — and why it is wrong — is addressed in Count I below.

33. Verizon also claims that, even if the entire *Rhode Island Agreement* is *prima facie* adoptable, Section 5.7.2.3 cannot be adopted because it is covered by one or more of the "conditions specified in this Paragraph" referred to at the beginning of Paragraph 32. There are a number of such carve-outs, but none of them remotely fits Section 5.7.2.3. Verizon's claims in this regard — and why they are wrong — are addressed in Count II below. Finally, Verizon was at pains in the discussions before the Enforcement Bureau to claim that even if Section 5.7.2.3 were adopted in Virginia and Massachusetts, it would still not result in a payment obligation because the *Reciprocal Compensation Ruling* resolved the issue of compensation for ISP-bound calls — precisely the argument litigated before, and rejected by, the Rhode Island commission in interpreting Section 5.7.2.3. This claim, and why ***it*** is wrong, is addressed in Count III.

34. It is something of an understatement to note that Verizon is a large corporate entity, sophisticated and well-represented in matters of regulatory policy. Global NAPs cannot assert from its own knowledge that Verizon was aware of the *Rhode Island Agreement* — including Section 5.7.2.3 — at the time it acceded to the terms of Paragraph 32. But Global NAPs ***can*** assert, and does, that Verizon may be ***presumed*** to have acceded to Paragraph 32 with full knowledge of the voluntarily-negotiated agreements that Bell Atlantic had entered into, region-wide — including the *Rhode Island Agreement*.[26]

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[26] In this regard, the *Rhode Island Agreement* was effective in late 1998 — after the Bell Atlantic-GTE merger was announced, and about the same time approval for it was sought. ….Continued

35. In any case, the GTE Merger Conditions, including Paragraph 32, took effect in June 2000. In July 2000, Global NAPs exercised its right under Paragraph 32 to export the fully-negotiated agreement between Verizon and Global NAPs in Rhode Island into Massachusetts and Virginia. Verizon disputed Global NAPs' right to do so under various theories. There ensued an exchange of letters and emails, as well as meetings with staff of the Enforcement Bureau, to try to resolve the parties' differences.[27]

36. The result of all of this effort was a truce of sorts — albeit a much more attenuated and indefinite one than included in the *Rhode Island Agreement* itself. The parties' new truce, embodied in their adoption agreements for Virginia and Massachusetts, is, in effect, a careful delineation of what they agree on and what they don't. The parties agree that, effective July 24, 2000, Global NAPs has adopted for Virginia and Massachusetts all portions of the *Rhode Island Agreement* that are subject to cross-border adoption under Paragraph 32. The parties disagree about what provisions of the *Rhode Island Agreement* are in or out, however, because they disagree about what Paragraph 32 means and how its language should be interpreted. And they particularly disagree about whether the negotiated compromise with regard to ISP-bound traffic, embodied in Section 5.7.2.3 of the *Rhode Island Agreement*, is in or out.

37. Hence this lawsuit.

38. As described below, the only logical way to apply Paragraph 32 to the circumstances of this case is for this Commission to hold: (a) that Global NAPs may adopt, and

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Moreover, Verizon's proposed conditions were originally submitted in January 2000 — ***after*** the Rhode Island commission had ruled that Section 5.7.2.3 requires continuing compensation.

[27] The principal documents involved in this exchange are attached as exhibits to this Complaint. *See* Exhibits 6-12.

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has adopted, the entire *Rhode Island Agreement* for Virginia and Massachusetts; (b) that, in particular, none of the "carve-outs" in Paragraph 32 applies to Section 5.7.2.3 of the *Rhode Island Agreement*; and (c) that Verizon is bound in Virginia and Massachusetts by the interpretation of the operation of Section 5.7.2.3 reached by the Rhode Island PSC following full litigation by Verizon and Global NAPs.

IV. CERTIFICATIONS

39. Global NAPs certifies that it has attempted to discuss and resolve this matter with Verizon. Global NAPs sent an electronic correspondence on December 19, 2000 to Verizon Associate General Counsel Jack H. White, Jr. and Verizon Senior Vice President Michael E. Glover indicating that Global NAPs was considering filing a complaint regarding Verizon's violation of Paragraph 32 of the Merger Conditions. See Exhibit 10. In response, on December 20, Verizon Regulatory Counsel Lawrence W. Katz reiterated in an electronic correspondence that Verizon's position regarding the applicability of Paragraph 32 to Global NAPs' right to opt into the Verizon-Global NAPs Rhode Island interconnection agreement in Virginia and Massachusetts had not changed. See Exhibit 11. On April 24, 2001, Global NAPs sent a letter by certified mail to Verizon outlining the allegations in the Formal Complaint and inviting a response. Exhibit 18. Verizon confirmed again on April 25, 2001, that its substantive views had not changed. See Exhibit 19. Verizon and Global NAPs have engaged in extensive informal mediation regarding this dispute. The parties have discussed the possibility of settlement prior to filing this Formal Complaint. See Exhibit 12.

40. No separate action has been filed with the Commission, any court, or other government agency based on the same claim or set of facts, and Global NAPs does not seek

similar relief in a notice-and-comment proceeding currently before the Commission.[28] No similar action relating to violation of Verizon's obligations under the Merger Conditions has been previously filed by Global NAPs. While not directly applicable to the matters at issue in this proceeding, the Commission on April 19, 2001 announced the adoption of new rules to clarify the treatment of ISP-bound telecommunications traffic. FCC, News, Federal Communications Commission Resolves Carrier Compensation Rules for Internet Traffic (April 19, 2001) (order still pending). Those rules, still not fully reported, appear to only affect the prospective amount of reciprocal compensation payments Verizon owes, not whether such payments are owed, nor the retrospective amounts owed for periods prior to adoption of the order. As discussed below, the new order may prospectively affect the parties' obligations under their agreement but does not affect this case, which relates to what the terms of the agreement are and to Verizon's obligations under Paragraph 32.

41. Verizon and Bell Atlantic have several other active matters currently being litigated, including: (1) an action against Global NAPs in the United States District Court for the Eastern District of New York relating to a dispute about the amount of traffic Verizon has sent to Global NAPs, *New York Tel Co. v. Global NAPs, Inc.*, No. 00 Civ. 2650 (E.D.N.Y., filed May 8, 2000); and (2) formal complaints challenging the lawfulness of an FCC tariff filed by Global NAPs which assesses a per-minute rate for calls originated by Verizon customers that are handed

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[28] The Commission has put on public notice a request by another CLEC, Birch Telecom, Inc., for interpretation of Paragraph 32 in a roughly analogous contract, and a request by Verizon to review the *Mattey Letter*. *See* News, *CCB Seeks Comment on Letters Filed by Verizon and Birch Re: Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, DA No. 01-722, 2001 FCC LEXIS 1977 (April 10, 2001) ("*MFN Public Notice*"). Global NAPs does not waive its right to comment in that proceeding.

off to Global NAPs for delivery to Internet service providers.[29] This other litigation does not address Verizon's compliance with terms of the Merger Conditions. In addition, Global NAPs has filed a petition for review by the U.S. Court of Appeals for the D.C. Circuit of the Commission's decisions in CC Docket No. 99-354, which denied Global NAPs' petition seeking preemption of the jurisdiction of the Massachusetts Department of Telecommunications and Energy pursuant to Section 252(e)(5) of the Act.[30] That matter does not address Verizon's compliance with the terms of the Merger Conditions.

V. DISCUSSION

COUNT I:

THE "ENTIRE AGREEMENT" FROM RHODE ISLAND IS SUBJECT TO ADOPTION IN OTHER STATES PURSUANT TO PARAGRAPH 32

42. Global NAPs hereby realleges and incorporates by reference paragraphs1 through 41 of this Formal Complaint.

43. In response to Global NAPs' request to adopt the entire *Rhode Island Agreement* in Virginia and Massachusetts, Verizon claimed that the entire agreement was not available for adoption. The reason, according to Verizon, was that the obligation to make "entire agreements" available was conditioned by the phrase "subject to Section 251(c)," so that only agreements

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[29] The Commission orders granting one of these complaints are under review by the D.C. Circuit. *See Global NAPs, Inc. v. FCC*, Case No. 00-1136. Global NAPs has filed a petition for reconsideration of the Commission order granting the second complaint, *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd. 20665 (2000), which is pending.

[30] *See, e.g.*, Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, *Memorandum Opinion and Order*, 15 FCC Rcd. 4943 (Common Carrier Bureau 2000).

addressing the subject matter of Section 251(c) — not Section 251(b), or other issues — were "entirely" adoptable.

44. This flies in the face of the plain language and purpose of Paragraph 32. In Paragraph 32, the Commission was attempting to encourage competition, facilitate rapid CLEC market entry, minimize CLEC business risk, and encourage the spread of "best practices" across state boundaries.[31] Having to parse complex commercial documents such as interconnection agreements to determine which parts relate to Section 251(c) and which relate to other matters would result in confusion, litigation, and delay. This would thwart, not advance, the purposes of Paragraph 32.

45. In this regard, Global NAPs notes that to its knowledge there are no "entire agreements" to which Verizon is a party that relate entirely to matters addressed in Section 251(c). Global NAPs has previously invited Verizon to identify any such agreement anywhere. *See* Letter from C. Savage (counsel for Global NAPs) to A. Dale, R. Karmarkar, and W. Davenport (FCC) (9/5/2000), at 12 & n.15, appended as Exhibit 8). Verizon has never even attempted to do so. This simply underscores that Verizon's interpretation of this aspect of Paragraph 32 is nonsensical. To adopt it would be to conclude that the specific reference to adoption of "an entire agreement" has, in the real world, no meaning or application.

46. Moreover, an alternative and much more sensible reading of the reference to Section 251(c) is available. The relevant language is: "Bell Atlantic/GTE shall make available[,] in the Bell Atlantic Service Area to any requesting telecommunications carrier any … provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c)." From this perspective, the phrase "subject to 47 U.S.C. § 251(c)" modifies the term

"interconnection agreement" by indicating the ***kind*** of agreement at issue. This makes sense because there are inter-company contracts that are reasonably classified as "interconnection agreements" that are ***not*** "subject to Section 251(c)." These include, for example, individual-case-basis contracts for the provision of access services.

47. Furthermore, as the Deputy Chief of the Common Carrier Bureau has noted, "Section 251(c)" actually embraces ***all*** of the topics that might be included in any interconnection agreement, in that (i) the prefatory language of that section expressly references Section 251(b), and (ii) Section 251(c)(1) imposes a general obligation on ILECs (such as Verizon) to negotiate in good faith regarding all interconnection matters. *See Mattey Letter* at 2. Verizon has claimed that this interpretation of Paragraph 32 would somehow unduly broaden its MFN obligations. *See* Letter to D. Attwood from G. Evans dated 2/20/01 at 2-3 (available at http://hraunfoss.fcc.gov:8835/edocs public/attachmatch/DA-01-722A2.pdf). What Verizon never explains, however, is what the term "including an entire agreement" could mean if it does not mean "an entire agreement." *See infra*.

48. As a result, ***any*** Section 251/252 "interconnection agreement," as normally understood, is an "interconnection agreement … subject to Section 251(c)." It follows that the *Rhode Island Agreement* is subject to adoption under Paragraph 32, subject only to any specifically applicable "carve outs" that might be contained there.

COUNT II:

SECTION 5.7.2.3 OF THE *RHODE ISLAND AGREEMENT* IS NOT AFFECTED BY ANY OF THE "CARVE-OUTS" CONTAINED IN PARAGRAPH 32

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[31] *See Merger Order* at ¶¶ 300-05, *esp.* ¶ 300; *see also Mattey Letter* at 2.

49. Global NAPs hereby realleges and incorporates by reference paragraphs 1 through 48 of this Formal Complaint.

50. Paragraph 32 is broadly modeled on Section 252(i), the MFN provision in the Act, and, broadly speaking, serves the same purposes of facilitating the spread of best practices, easing CLEC market entry, and avoiding discrimination among CLECs. In interpreting Section 252(i), the Commission has narrowed somewhat the broad scope of the statutory language. Specifically, in 47 C.F.R. § 51.809(b) and (c), the Commission has given ILECs certain grounds for escaping the statutory MFN obligation. Similarly, while the first part of Paragraph 32 establishes a general MFN obligation, the rest of the language qualifies that obligation in various ways. In this regard — while the interpretation of this language is not totally clear — Paragraph 32 states that "Exclusive of price and state-specific performance measures and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)." This makes explicit the relationship between Paragraph 32 and Section 252(i).

51. As a general matter, therefore, just as an agreement to pay for ISP-bound calls is adoptable within a state under Section 252(i), an agreement to pay for ISP-bound calls is subject to cross-border adoption under Paragraph 32.

52. While Paragraph 32 and Section 252(i) are related, however, Paragraph 32 contains a number of "carve out" provisions that are not directly comparable to the exclusions in 47 C.F.R. § 51.809(b) and (c). As discussed below, these various carve-outs have a single, unifying purpose: ensuring that matters that are legitimately viewed as "state specific" are not, by virtue of Paragraph 32, exportable across state lines. In this particular case, the Commission

needs to clarify both that this is, indeed, the core purpose of the carve-outs, and to rule that Section 5.7.2.3 of the *Rhode Island Agreement* is not subject to them.[32]

53. In this regard, Verizon has claimed in the past (and, Global NAPs assumes, will assert here) that Section 5.7.2.3 of the *Rhode Island Agreement* is not adoptable under Paragraph 32 because it falls into one or more of the "carve outs." As discussed below, this claim is baseless. First, however, Global NAPs addresses below why this issue must be resolved here, as opposed to the states.

A. STATE AUTHORITY UNDER PARAGRAPH 32

54. Nothing in Paragraph 32 directly purports to empower states to do anything that they could not already do in the absence of Paragraph 32. To the contrary, the only mention in Paragraph 32 of state commissions deciding anything at all is in the last sentence: "Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 ***to the extent applicable.***" The emphasized phrase suggests an awareness that it was not entirely clear how and whether Section 252 would come into play.

55. That uncertainty is quite well-founded. Nothing in the portions of the Act under which the Commission relied in adopting Paragraph 32 remotely authorizes the Commission to empower state commissions to do anything they could not already do under Sections 251 and

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[32] In some sense it would be very simple if Paragraph 32 simply said that, if "X" is adoptable in-state under Section 252(i), then "X" is adoptable out-of-state under Paragraph 32. In various respects, however, such a simple rule would not make sense, because certain matters — *e.g.*, UNE prices — are set on a state-specific basis. So, for example, a UNE 2-wire loop could be priced at (say) $10 per month in one state and (say) $20 per month in a more rural state with longer loops. At the same time, while some matters are reasonably deemed to be state-specific, others are not. Paragraph 32's various carve-outs, from this perspective, are best ….Continued

252. Assuming *arguendo* that the Commission could expand or contract state authority by enacting rules to implement those sections (either on the strength of Section 251(d)(3) or Section 201(b), as suggested by the Court in *AT&T Corp. v. Iowa Utilities Board*[33]), in adopting Paragraph 32 the Commission acted under Sections 214, 309, and 310 of the Act.[34] It is well-settled that the Commission may not, in acting under one grant of statutory authority, exercise powers that are given under another. *See Illinois Bell v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992); *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218, 231 & n.4 (1994). So there is no legal basis on which to premise the conclusion that Paragraph 32 "gave" states any power that they did not already have under Sections 251 and 252.

56. Moreover, it is quite clear that nothing in Section 252 on its face "applies" to a raw dispute about the meaning of Paragraph 32 such as that at issue here — including a dispute about whether particular agreements (or portions thereof) are adoptable under the terms of that paragraph. Paragraph 32 is an independent legal obligation of Verizon, imposed by the Commission in connection with its approval of the transfer of spectrum licenses and international authorizations. That independent legal obligation, obviously, was crafted with an eye towards the purposes and policies of Section 252(i). But no one ever suggested, to Global NAPs' knowledge, that Paragraph 32 simply embodies or clarifies what Section 252(i) already required. To the contrary, the whole point of Paragraph 32 was to go ***beyond*** what Section 252(i) required. Specifically, at least as conventionally applied, Section 252(i) does not authorize a CLEC to

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viewed as efforts to give Verizon "protection" from cross-border adoption of state-specific matters, while still maximizing CLEC MFN rights.

33 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377 (1999).

34 *See Merger Order* at ¶ 439.

adopt in one state an interconnection agreement that an ILEC affiliate may have entered into in another state.[35]

57. Some of the language of Paragraph 32 provides the solution to this conundrum, and also explains the proper scope of state commission proceedings and decisions — within the scope of the authority granted them by Congress under Section 252.

58. At the outset, Paragraph 32 states that "Bell Atlantic/GTE shall make available" certain agreements and arrangements. Later it states that "qualifying interconnection arrangements or UNEs ***shall be made available*** to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)." Later still, it states that "where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE ***shall offer to enter into an agreement*** with the requesting telecommunications carrier" that meets certain criteria. This language does not direct or empower states to do anything. To the contrary, it requires ***Verizon*** to do something — specifically, to make a legally binding ***offer*** to enter into an interconnection agreement meeting the requirements of Paragraph 32.

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[35] That said, Section 252(i) may provide an easy answer for the Commission in connection with the Massachusetts portion of this dispute. Section 252(i) says nothing about being limited by state boundaries. To the contrary, it applies to all agreements that a particular "local exchange carrier" may have entered into. Here, the same corporate entity that is the ILEC in Rhode Island — New England Telephone & Telegraph Company — is the ILEC in Massachusetts. The Commission could resolve this case with respect to Massachusetts, therefore, by ruling that the *Rhode Island Agreement* is available in all respects in Massachusetts, simply because the same corporate entity that is the relevant "local exchange carrier" is the ILEC in each case. Again, this is all that is required by the language of Section 252(i). None of the "carve-outs" of Paragraph 32, of course, is relevant under Section 252(i); Verizon's sole means to resist the exercise of MFN rights under Section 252(i) are those provided by 47 C.F.R. §§ 809(b) and (c), and none of those regulations remotely disqualifies Section 5.7.2.3 from adoption. Global NAPs expressly requests such a ruling — specifically, that it is entitled under

….Continued

59. Now, once Verizon has made such an offer — that is, an offer to enter into an interconnection agreement — the affected CLEC is free to accept it. Once accepted, the result is an interconnection agreement under Section 252(a)(1).

60. This is where the states come in, and this shows the "extent" to which Section 252 is "applicable" to Paragraph 32. Under Section 252(e)(1), interconnection agreements have to be submitted to states for approval.[36] Such agreements must be approved by the state unless for some reason it fails to meet the criteria of Section 252(e)(2)(A). The state commission's review under Section 252(e)(2)(A) would, of course, give it an opportunity to prevent the adoption, in its jurisdiction, of any agreement that (for example) violated that state's laws, as contemplated by the portion of Paragraph 32 that refers to interconnection arrangements or UNEs that are not "consistent with the laws and regulatory requirements" of that state.

61. But there is no role for state regulators in assessing whether or not Verizon has made the offer required by Paragraph 32. Verizon's obligation to offer, in one state, interconnection agreements and arrangements negotiated in another, does not arise out of Section 251 or 252 of the Communications Act. Consequently, that obligation does not arise out of any provision of the Communications Act that authorizes or empowers state commissions to have any role with respect to it.[37] Verizon's obligation to offer, in one state, agreements and arrangements from another state arises entirely from Paragraph 32 — an FCC pronouncement

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Section 252(i) to adopt the *Rhode Island Agreement* in Massachusetts, because the same ILEC serves each state — as an alternative ground for relief in this case with respect to Massachusetts.

[36] The Commission has held that this requirement does not apply to a CLEC exercising its rights under Section 252(i), *i.e.*, that Section 252(i) is, in this sense, self-executing. *See New Jersey Section 252(i) Order*, 14 FCC Rcd. 12530, at ¶ 4. But Paragraph 32 is not Section 252(i).

[37] *But see* note 35, *supra.*

that is binding on ***Verizon*** as a private party, not on any state operating within the Section 251/252 framework.

62. The result of this analysis is that as a matter of law, any Verizon failure to ***offer*** to a CLEC (such as Global NAPs) the terms and conditions of an out-of-state agreement that Verizon is actually required to offer under Paragraph 32 is, pure and simple, a violation of Paragraph 32 — an order of this Commission, not of any state commission. As a result, the ***only*** proper forum to obtain an adjudication of whether Verizon's contract offer to Global NAPs in Massachusetts and Virginia is adequate under the terms of Paragraph 32 is right here at the FCC.

63. Moreover, only this Commission may adjudicate what, precisely, Paragraph 32 requires. That is what is at issue here.

64. Verizon is obliged under Paragraph 32 to offer the entire *Rhode Island Agreement* to Global NAPs (or any other CLEC) in any pre-merger Bell Atlantic state. If Verizon claims that Paragraph 32 permits it to hedge that offer in any way (and it obviously does claim that), the place to have that dispute resolved is here — which is why Global NAPs is filing this complaint.

65. Global NAPs is aware that some may have thought that more of the work of sorting out these types of disputes had been delegated to the states by virtue of the language of Paragraph 32. With due respect, that cannot be true, because there is no coherent legal theory under which the Commission — by accepting and modifying Verizon's proffered conditions and including them in an order issued under Sections 214, 309 and 310 of the Act — could expand, contract, or even affect the scope of state authority over the review and approval of interconnection agreements subject to Sections 251 and 252 of the Act.[38]

[38] It is conceivable that the Commission could, through an appropriate rulemaking proceeding, bring the requirements of Paragraph 32 and similar requirements on other ILECs ….Continued

66. It is hard to quarrel with the general spirit of state-federal cooperation that Paragraph 32 might have been intended to embody. But when the dust settles, the arrangement that Verizon seems to think Paragraph 32 created — pseudo-voluntary state determinations of the scope of Verizon's obligations under an FCC order not issued under Sections 251 or 252 — is another "intuitively backwards" result of the general sort condemned by the D.C. Circuit in *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).[39]

67. In sum, the only legally sustainable interpretation of the role of state regulators under Paragraph 32 is that Paragraph 32 establishes a ***federal*** obligation on Verizon to ***offer*** certain contract terms to CLECs that it was not otherwise obliged to offer under (for example)

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within the ambit of state regulatory authority. The Commission would do this by relying on its authority under Sections 201(b) and/or 251(d)(1) to amend the regulations applicable to state-conducted Section 252 arbitrations. For instance, one could imagine an amendment to 47 C.F.R. § 51.809 that expressly defined CLEC MFN rights to include those granted in Paragraph 32. But no such rulemaking has yet occurred, and in any case in the normal course the result of such a rulemaking would be prospective only. And, as noted above, even if the Commission might have such power under statutory authority that it has not invoked here, that does not mean that it can be deemed to have exercised those (in fact, unused) statutory powers. *See Illinois Bell v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992); *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218, 231 & n.4 (1994). The upshot is that, while there may be some way for the Commission to legally empower state regulators to get involved in the administration and enforcement of merger-related expanded MFN rights, it is quite clear that this has not happened ***yet.***

[39] To illustrate but one of the problems caused by any interpretation of the respective roles of states versus this Commission under Paragraph 32 other than that advanced by Global NAPs here, consider the problem of a state decision about whether such-and-such provision is, or is not, adoptable in that state under Paragraph 32. Either the ILEC or the CLEC may be displeased with such a state decision. But where should the displeased party file its appeal? Since the state commission decision would not (by hypothesis) arise under Section 252, federal court jurisdiction under Section 252(e)(6) would appear to be lacking. So would the displeased party have to seek review of a state regulator's interpretation of this Commission's order in state court? But why should special federally-created rights under Paragraph 32 have no route to federal court for vindication? And, while (as Global NAPs understands it) Verizon is precluded from claiming that a state commission lacks jurisdiction to make the relevant determinations, nothing precludes a CLEC from so arguing, on appeal, if the CLEC is disappointed with the result — leading to the prospect of various state courts ruling that their respective PSCs do not

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Section 252(i) of the Act. The question whether Verizon has met its obligation to make such offers, therefore (and, in this case, the content of such an offer), is a question for this Commission.[40] Once such an offer has been made and accepted, the resulting agreement is an "agreement … adopted by negotiation" for purposes of Section 252(e)(2)(A), which must be submitted to the relevant state commission for review and approval under the terms of that provision, like any other negotiated agreement.

68. Global NAPs recognizes that from time to time this may involve the Commission in assessing whether particular provisions of a contract from an "exporting" state must be offered to a CLEC in a particular "importing" state. But there is nothing peculiar about such a situation. The Commission has established a (federal) rule requiring Verizon to make certain offers, with the precise terms of the offers dependent, in some cases, on the particulars of state law. This means that this Commission may, from time to time, have to rely on its understanding of state law to decide whether Verizon has met its federal obligations. It is commonplace, however, for adjudicators in one jurisdiction to have to apply the law of another jurisdiction.[41] And there is certainly no reason to suspect that the Commission is somehow unable to read the laws and regulatory rulings of any state and understand what those laws and rulings mean.

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69. The upshot of the analysis above is that the best way to interpret Paragraph 32 is as a federally-imposed obligation on Verizon to make certain offers to CLECs. Specifically,

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have the authority to undertake their (supposed) function under Paragraph 32. And, of course, federal court jurisdiction may not be conferred by agreement – or by FCC order.

[40] The Commission recognizes that it has a role in enforcing the merger conditions, including the MFN conditions. *See Merger Order* at ¶ 303.

[41] Broadly speaking, when and how this occurs is what the law school topic of "Conflict of Laws" is about.

Paragraph 32 imposes a federal duty on Verizon to offer CLECs terms and conditions in out-of-state interconnection agreements that Verizon would not otherwise have to, or want to, offer. Whether the offer(s) Verizon has made meet that federal obligation is a federal question for determination by this Commission.

70. Once a federally-mandated offer has been made and accepted, the resulting agreement flows into the normal Section 252 review process applicable to any other negotiated agreements. That process gives states full ability to protect any state-specific interests that might affect the right of a CLEC to import any particular interconnection agreement or portion thereof. This situation is to be distinguished from Section 252(i) MFN rights, where the Commission has ruled that state regulators are not normally involved in approving the agreements resulting from the exercise of those rights.[42]

71. The remainder of this Count II, therefore, is devoted to parsing the various "carve-outs" contained in Paragraph 32 to determine whether any of them would permit Verizon to refuse to offer to include Section 5.7.2.3 of the *Rhode Island Agreement* into the new Global NAPs/Verizon agreements for Massachusetts and Virginia.

72. Here, it is noteworthy that Verizon has agreed that its offer ***did*** include everything that Global NAPs was entitled to under Paragraph 32. Consequently, the Commission's ruling in this case will determine whether Section 5.7.2.3 is — as Global NAPs contends — already a part of the parties' contracts in Virginia and Massachusetts.[43]

B. THE CARVE-OUTS

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[42] *See New Jersey Section 252(i) Order*, 14 FCC Rcd. 12530, at ¶ 4.

[43] Global NAPs notes that it has only exercised its Paragraph 32 rights in New Jersey, Delaware and Pennsylvania. While only a small amount of traffic has been exchanged under ….Continued

73. Paragraph 32 contains a number of carve-outs to the general obligation to make a negotiated agreement from one pre-merger state available in other pre-merger states. Here is what the "carve-out" provisions in Paragraph 32 say (with separate carve-outs indicated by bracketed numbers):

> **[1]** Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. **[2]** Exclusive of price and state-specific performance measures and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that **[3]** the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement. **[4]** The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. **[5]** This Paragraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). **[6]** Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and **[7]** is consistent with the laws and regulatory requirements of, the state for which the request is made and **[8]** with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable. *GTE Merger Conditions*, ¶ 32.

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those agreements, the Commission's decision in this case will determine the parties' rights in those states as well.

74. As described below, none of these carve-outs applies to Section 5.7.2.3 of the *Rhode Island Agreement*.

1. THE CARVE-OUTS ONLY APPLY TO "INTERCONNECTION ARRANGEMENTS" AND "UNEs," NOT TO OTHER "PROVISIONS" OR "ENTIRE AGREEMENTS"

75. Verizon maintains that Section 5.7.2.3 of the *Rhode Island Agreement* is not adoptable under Paragraph 32 because it is covered by one or more of the specific "carve outs" in that Paragraph that limit, to some extent, the scope of the MFN rights the opening sentences of the paragraph create. To assess this claim, it is important to parse the language of Paragraph 32 carefully, in order to see whether there is any need to consider the carve-outs at all.[44] In fact, under a proper reading of that language, the entire consideration of the carve-outs can be dispensed with.

76. The specific provision on which Global NAPs relies says that Verizon must make available to Global NAPs "any interconnection arrangement, UNE, or provisions of an interconnection agreement ***(including an entire agreement)*** … that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1) …" (emphasis added). The emphasized language was clearly the result of concerns expressed during the merger review process: it did not appear in the draft conditions until May

[44] Legally, it appears that the GTE Merger Conditions, and Paragraph 32, are analogous to a form of consent decree in which the Commission in its role as enforcement agency reached a deal with Bell Atlantic and GTE in their role as firms subject to the agency's enforcement jurisdiction. Now, the Commission in its role as adjudicator is being called upon to interpret the terms of this deal. In this regard, D.C. Circuit law establishes that consent decrees are to be interpreted as though they are contracts. *See United States v. Western Electric Co.*, 900 F.2d 283, 293 (D.C. Cir. 1990).

2000 — only about a month before the merger was approved.[45] Here, what Global NAPs has done — if Verizon would only admit it — is adopt ***all*** the "provisions of an interconnection agreement," *i.e.*, an "entire agreement," that was voluntarily negotiated in Rhode Island, for use in Massachusetts and Virginia.

77. Consider first the language of the "carve outs" in Paragraph 32. Tariffed matters are carved out in fairly broad terms, although, as described below, Verizon tariffs have nothing to do with this case.[46] But beyond the general carve-out for tariffed matters, ***every*** other carve-out relates to situations in which an "interconnection arrangement" or "UNE" might not be available in an importing state. Now look again at the general MFN obligation imposed by Paragraph 32: Verizon has to make available to CLECs in other states "any [1] ***interconnection arrangement,*** [2] ***UNE,*** or [3] provisions of an interconnection agreement ([4] including an entire agreement) … that was voluntarily negotiated … ." The familiar (and sensible) rule is that when a legal obligation uses different language in some places than it uses in others, the different language has a different meaning.[47] Applying that rule, "interconnection arrangements" and "UNEs" are different from each other, and different still from either "provisions of an interconnection agreement" or "an entire agreement."

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[45] *See ex parte* Letter from P. Koch, Bell Atlantic, to M. Salas, FCC, dated May 19, 2000 (Exhibit 13), especially at 44. This letter contains a "redlined" version of the draft conditions, showing the emphasized language as new.

[46] "Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions."

[47] This rule applies, at least, to statutes and regulations. *See, e.g.*, 2A N. Singer, Sutherland on Statutory Construction § 46.07 (6th ed. 2000 and Supp. 2001); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 881 (1984). So whatever the legal status of the merger conditions (for what it's worth, Global NAPs thinks that, for administrative law purposes, they may be best understood as negotiated regulations), the different language used in different parts of Paragraph 32 is entitled to have separate meanings.

78. This, of course, is consistent both with plain English and with the underlying local competition statute that was clearly addressed in Paragraph 32. Section 251(c)(2) imposes on ILECs such as Bell Atlantic an obligation to "interconnect;" logically, Paragraph 32's reference to an "interconnection arrangement" would be a reference to "arrangements" effecting the interconnection obligation. Similarly, Section 251(c)(3) obliges Bell Atlantic to make UNEs available. Logically, therefore, Paragraph 32's reference to "UNEs" refers to that statutory provision.

79. Precisely because these two concepts are somewhat limited — most interconnection agreements deal with matters other than "UNEs" or "interconnection arrangements" — Paragraph 32's MFN obligation is much broader than "UNEs" or "interconnection arrangements." It includes "provisions of an interconnection agreement" and "entire agreements" as well. Indeed, ***making*** the MFN obligation broader was plainly the key purpose of adding the "including an entire agreement" language late in the negotiation of the merger conditions.

80. But this plain, logical conclusion — that the terms "provisions of an interconnection agreement" and "including an entire agreement" mean something different than the terms "interconnection arrangement" or "UNE" — is fatal to Verizon's claim (which Global NAPs assumes Verizon still makes) that ***any*** of the carve-outs apply to Section 5.7.2.3 of the *Rhode Island Agreement*. This is because, as noted above, what the carve-outs protect against is the export, in certain circumstances, of "interconnection arrangements" or "UNEs" from one state into another. Except to the extent that "provisions of an interconnection agreement" (including relevant portions of "an entire agreement") directly ***deal with*** "interconnection

arrangements" or "UNEs," a plain reading of the carve-out language makes clear that ***the carve-outs provide no limitation on MFN rights.***

81. It is clear on its face that Section 5.7.2.3 is neither an "interconnection arrangement" nor a "UNE." It is simply a negotiated compromise of a definitional dispute about how to classify, for payment purposes, certain traffic that will flow over whatever "interconnection arrangements" the parties establish. It follows that ***none*** of the carve-outs could possibly apply to this section. This alone is a sufficient reason to declare that Verizon is wrong to claim that Section 5.7.2.3 is not adoptable.

82. As described in detail below, however, even if one assumes that Section 5.7.2.3 might be subject to the carve-outs in the abstract, in fact it transgresses none of them, and so is fully adoptable under that theory as well.

2. NONE OF THE CARVE-OUTS BARS ADOPTION OF SECTION 5.7.2.3, EVEN IF IT MUST BE ASSESSED IN LIGHT OF THEIR REQUIREMENTS

83. Global NAPs noted above that there are, for these purposes, eight separate carve-outs. It is quite clear that most of them have no application to this case at all, and that the one that (arguably) does cannot and does not ban the cross-border adoption of Section 5.7.2.3. References are to the carve-out numbers inserted above.

[1] *Tariffs.* No Verizon tariff is implicated in this case. Specifically, Section 5.7.2.3, the key disputed provision, makes no reference to, and does not incorporate, any Verizon tariffs. So this carve-out is inapplicable.[48]

[48] As with all of Global NAPs' discussion of the issues in dispute, Global NAPs reserves the right to reply to any Verizon Answer that purports to raise issues that Global NAPs has not addressed in this Complaint. *See* note 8 and accompanying text, *supra.*

[2] *State-specific Price/Performance Measures.* Neither state-specific prices nor state-specific performance measures are implicated by Section 5.7.2.3. Performance measures are simply irrelevant to this dispute. As to prices, Section 5.7.2.3 says only that ISP-bound calls will be treated, for contractual purposes, like local calls. That said, Global NAPs in 1998 negotiated basically identical contracts with Verizon that specified a single rate of $0.008 per minute for compensable traffic, with that same rate applying in New York, Rhode Island, Massachusetts, Maine, New Hampshire, and Vermont. There is no meaningful sense in which the $0.008 rate is "state specific." For this reason, there is no reason for this Commission to conclude that the $0.008 rate in the Rhode Island Agreement is subject to the "state-specific pricing" carve out, and the Commission should reject any Verizon assertion that it is.

[3] *Adoption of provisions beyond their expiration date/reasonably related terms.* Section 5.7.2.3 has no expiration date other than the general expiration date of the overall *Rhode Island Agreement*. Global NAPs adopted all reasonably related terms to Section 5.7.2.3 since it adopted the entire contract. This carve-out, therefore, has no application here. Global NAPs notes that Verizon contends that Section 5.7.2.3 somehow "expired" by virtue of the Commission's vacated February 1999 *Reciprocal Compensation Order*. This is plainly wrong, but is addressed in detail in Count III, below.

[4] *State-Specific Prices.* As noted above, Section 5.7.2.3 is not a pricing provision; it is, in effect, a compromise definitional provision. *See* discussion of carve-out [2], above.

[5] *Arbitrated/State-Negotiated Provisions.* Neither Section 5.7.2.3 nor any other part of the *Rhode Island Agreement* was arbitrated, and neither Section 5.7.2.3 nor any

other part of the *Rhode Island Agreement* reflects matters negotiated between Bell Atlantic and the Rhode Island state regulators. This carve-out, therefore, has no application to this dispute.

[6] *Technical, Network, or OSS Feasibility Limitations.* Section 5.7.2.3 does not contain or invoke any state-specific or other limitations on technical feasibility, network interconnection, or OSS functions. All it does is state that a certain class of plain-vanilla voice-grade traffic (that is, traffic bound for ISPs) shall be treated as "local" for compensation purposes under certain conditions. There is no basis for any claim that this carve-out has anything to do with this case.

[8] *Collective Bargaining Agreements.* Nothing about Section 5.7.2.3 remotely affects any collective bargaining agreement in any state.

84. The only carve-out that is not facially and utterly inapplicable to this dispute is carve-out [7], which states that "Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is … consistent with the laws and regulatory requirements of, the state for which the request is made." Verizon's claims that Section 5.7.2.3 fails this test are completely wrong.

85. This is so on two levels. The first relates to the role of the states in approving agreements entered into as a result of Paragraph 32. The second relates to what Section 5.7.2.3 actually provides and the legal status of the issue of compensation for ISP-bound calling in Massachusetts and Virginia. These are addressed in turn below.

86. First, as discussed above, the basic requirement of Paragraph 32 is that Verizon must make certain offers to CLECs that it would not otherwise be required to make. Here, that requires that Verizon grit its teeth and offer Global NAPs (and any other CLEC) the terms of the *Rhode Island Agreement*, including Section 5.7.2.3. The resulting agreement (assuming the

CLEC accepts the offer) is then submitted to the state commission as a negotiated agreement for approval under Section 252(e)(2)(A) of the Act. That negotiated agreement will either be approved or rejected by the affected state regulator under the standards of Section 252(e)(2)(A). One of those standards, contained in Section 252(e)(2)(A)(ii), is that a state may only reject a negotiated agreement if the terms are "not consistent with the public interest, convenience, and necessity." Otherwise, the state has no discretion to reject such a negotiated deal.[49] This fully protects the state's interest in preventing the importation of contract terms that in some affirmative way violate state policy and Verizon's interest in not having to operate contrary to the rules and regulations applicable in one state simply because another state has different rules and regulations.

87. Second, as Global NAPs understands it, Verizon claims that the Virginia and/or Massachusetts regulators would not ***require*** Verizon to pay for ISP-bound calls, and that this (supposed) policy on the part of those states means that Section 5.7.2.3 is not adoptable. But this is plainly nonsense. Again, an agreement presented to a state regulator arising from the exercise of Paragraph 32 rights is, legally, a negotiated agreement between Verizon and the CLEC. The only distinctive thing about it legally is that the offer that Verizon made leading up to the agreement was made as a result of Paragraph 32, as opposed to as a result of the then-current negotiating strategy of Verizon. Even if we assume that the relevant state regulators would not ***require*** payment of compensation for ISP-bound calls as contemplated by Section 5.7.2.3 (*e.g.*,

[49] Under Section 252(c)(2)(A)(i), a state may reject a negotiated deal if it is discriminatory to carriers not parties to it. But here, the same Section 5.7.2.3 is available to all CLECs in all former Bell Atlantic states, so there is no possibility of discrimination. Also, as Verizon has noted, it has entered into other voluntary agreements with other carriers requiring compensation for ISP-bound calls in Massachusetts. It can hardly be found to be discriminatory to enter into another such deal with Verizon under the MFN provisions of the GTE Merger Conditions.

in an arbitration of a new agreement), that is irrelevant. What matters is whether the relevant state regulators would ***forbid*** the inclusion of such a provision in a ***negotiated*** agreement.

88. It is obvious that neither Massachusetts nor Virginia regulators would forbid the inclusion of Section 5.7.2.3 or any similar provision. In Virginia, the State Corporation Commission affirmatively required compensation for ISP-bound calls under interconnection agreements, until it concluded that the matter was really one for this Commission to resolve and started declining jurisdiction over this issue.[50] And while the Massachusetts DTE has been less than supportive of imposing compensation for ISP-bound calls, it, like Verizon, has noted with approval the fact that Verizon has successfully negotiated an agreement with some carriers that specifically provides for such compensation.[51] So it blinks reality to suggest that the DTE is

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[50] *See* Petition of Starpower Communications, LLC for Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc., *Final Order*, 2000 Va. PUC Lexis 36 (2000); Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, *Memorandum Opinion and Order*, 15 FCC Rcd. 11277 (2000).

[51] In the words of the DTE:

> Given the variety of possible commercial arrangements between LEC and ISP, the FCC tentatively concluded that a negotiation process, driven by market forces, was more likely to lead to efficient outcomes than are rates set by regulation. Id. We concurred with this conclusion and suggested that the parties in this matter pursue that course of action rather than renewing their quarrel over the payment of reciprocal compensation. D.T.E. 97-116-C at 27-31. We reaffirm that conclusion and reiterate that suggestion today.
>
> As matters have transpired in the interim, negotiation has borne commercial fruit in two instances. [footnote referring to Level 3 and another voluntary deal omitted] The Department would prefer to see negotiated amendments to all of the interconnection agreements at issue here. As a general rule, it is better -- far better -- for businesses, rather than regulators, to reach commercial decisions.

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts for breach of interconnection terms entered into under Section 251 and 252 of the Telecommunications Act of 1996, *Order Denying Motions for Reconsideration and Dismissing Global NAPs Complaint*, D.T.E. 97-116D, available at ….Continued

opposed as a matter of principle to any negotiated deal in which Verizon agrees to pay for ISP-bound calls.[52]

89. As a result, there is no credible basis for asserting that either Massachusetts or Virginia would find it "[in]consistent with the public interest, convenience or necessity" in those states for Verizon to voluntarily agree to pay compensation for ISP-bound calls under the conditions set out in Section 5.7.2.3. Yet that is exactly the legal status of that provision. As a result, this final "carve-out" does not apply to Section 5.7.2.3, and there is no basis for any conclusion other than that Section 5.7.2.3 has been adopted by Global NAPs in, and is fully effective in, Massachusetts and Virginia.

* * * * *

90. To some extent, in the discussion above, Global NAPs has undertaken to prove a negative, *viz.*, that Section 5.7.2.3 is not covered by any of the carve-outs in Paragraph 32. In so doing, Global NAPs has tried to anticipate what, if any, arguments Verizon might make in

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www.state.ma.us/dpu/telecom/97-116/Dorder.htm. So any Verizon claim that the DTE is anything other than fully supportive of negotiated arrangements with regard to this topic is absurd.

[52] Obviously, Global NAPs believes that the DTE's basic approach "on the merits" to compensation for ISP-bound calling is wrong. Briefly, the DTE simultaneously misread the Commission's February 1999 order on this topic to require reexamination of its prior decision requiring compensation, then relied exclusively on the reasoning of the February 1999 order to conclude, in May 1999, that its earlier decision requiring compensation for ISP-bound calls should be vacated, without ever doing what the February 1999 order contemplated, which was examining the relevant ***contracts*** between Verizon and the CLECs. Adding insult (and more injury) to injury, when the D.C. Circuit vacated the February 1999 order, rendering it null and void *ab initio,* the DTE then refused to follow the logic of its own decision, which would have resulted in vacating the DTE's own May 1999 order and automatically reinstating the then-existing compensation obligation. But for purposes of this proceeding before this Commission, all of this is beside the point. What matters is that the DTE spoke approvingly of negotiated agreements resolving the question of compensation for ISP-bound calls, which, legally, is what exists today between Verizon and Global NAPs in Massachusetts by virtue of Paragraph 32.

support of a claim that a carve-out does apply — including, but not limited to, the arguments that Verizon actually asserted during the parties' earlier attempt to resolve this problem with the informal aid of the Enforcement Bureau. However, Global NAPs' ability to anticipate Verizon's regulatory theories is less than perfect. For this reason, as noted above, Global NAPs respectfully requests that the Commission waive Section 1.726(a) of its complaint case rules to permit Global NAPs to file a response to any argument raised in Verizon's answer that Global NAPs has not already addressed. Global NAPs respectfully suggests that a status conference be held promptly after receipt of Verizon's answer to determine the scope of any appropriate Global NAPs reply.

COUNT III:

VERIZON IS BARRED BY PRINCIPLES OF RES JUDICATA FROM ASSERTING THAT SECTION 5.7.2.3 MEANS ANYTHING OTHER THAN WHAT THE RHODE ISLAND PUC SAYS IT MEANS

91. Global NAPs hereby realleges and incorporates by reference paragraphs 1 through 90 of this Formal Complaint.

92. Verizon's final — and in some ways most insidious — attack on its Paragraph 32 MFN obligations is that Section 5.7.2.3 is not adoptable in states other than Rhode Island because it has "expired" because this Commission's February 1999 order "resolved" the question of the status of ISP-bound calls for purposes of compensation. This Verizon position is based on a reading of Section 5.7.2.3 that is not only inconsistent with the terms of the agreement, but also with a specific ruling from the Rhode Island regulators as to what the provision means. The Rhode Island regulators have specifically ruled that Section 5.7.2.3 continues to require compensation for ISP-bound calls even after this Commission's February 1999 ruling, because that ruling did not so much "resolve" the question of compensation for ISP-bound calling as

defer it to the states for case-by-case determinations. Moreover, the Rhode Island regulators issued that ruling late in 1999 — a good ***six months*** before Bell Atlantic and GTE voluntarily accepted the requirements of Paragraph 32 by consummating their deal. As a result, Verizon cannot remotely complain that the meaning of Section 5.7.2.3 was somehow unknown to it, or that exporting Section 5.7.2.3 ***as interpreted by the regulator with primary jurisdiction over it*** would somehow expand the scope of Verizon's obligations under Paragraph 32 beyond what Verizon had before it in June 2000 when it accepted that condition.

93. Here, Verizon is seeking to undermine the purpose and effect of Paragraph 32 by saying that a CLEC cannot actually adopt the term of any interconnection agreement. All it can adopt is the right to litigate with Verizon about what a term of an interconnection agreement means, ***even if that question has already been fully and fairly litigated.*** The Commission must reject this obstructionist and anticompetitive approach.

94. To see the anticompetitive nature of Verizon's position, consider a situation in which there is a fully negotiated agreement with some term that is less than 100% clear. Now suppose that a dispute over that term boils over into litigation between the ILEC and the CLEC with whom it originally negotiated the term. The parties, in effect, ask the state commission, "What does this provision mean?" And the state commission gives an answer. In those circumstances, the state commission's answer ***is what the provision means.***

95. To see this, take a hypothetical provision unrelated to the present dispute. Suppose a CLEC has a 24x7x365 network operations center. Suppose also that it needs some network usage reports from the ILEC once a month in order to perform important internal forecasting and network management functions. And suppose, in furtherance of this goal, the ILEC and the CLEC agree that these reports will be delivered on "the first Monday of each

month." Such a contract could lead to disputes about what to do about holidays that might fall on the first Monday (*e.g.*, Labor Day, Memorial Day, the Fourth of July, New Year's Day).

96. Suppose that such a dispute arises; that the parties litigate; and that the state commission holds that, in legal terms, the contract unambiguously requires "first Monday" delivery of the data, *i.e.*, that the ILEC gets no exception for holidays.[53] Under the contract the ILEC signed, the ILEC must deliver usage reports on the first Monday of each month, even though some are holidays, and even though that will cause the ILEC to incur some costs (*e.g.*, overtime pay) that it did not subjectively anticipate. And suppose that the ILEC allows this ruling to stand without appeal or reconsideration.

97. Now suppose that a second CLEC in the same state (with a similar 24x7x365 NOC, and similar needs for data) adopts the same contract under Section 252(i). Does the ILEC have any good faith basis for arguing that it does not owe the ***second*** CLEC usage reports on "the first Monday of each month," ***including*** holidays? Of course not. Prior to the ruling in the (hypothetical) litigation just described, whether ***that particular contract*** envisioned delivery of data on holidays was an open issue. But following that ruling, there are simply no reasonable grounds for disputing what the "first Monday of each month" means: it includes holidays.

98. This is exactly analogous to the situation we have here. Verizon and Global NAPs entered into a voluntarily negotiated agreement in Rhode Island. That agreement contains a provision that requires Verizon to pay for ISP-bound calls under certain conditions — broadly speaking, while the issue of the proper treatment of such calls is still in dispute. Following this

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[53] Note that as a matter of contract law, the fact that there are two sides to a contract dispute — even a vigorously contested one — does not prevent a finding at the end of the day that the language is, legally, "unambiguous." The main function of such a legal determination is to ….Continued

Commission's February 1999 order on compensation for ISP-bound calls, Verizon asserted that the conditions calling for payment no longer existed.[54] Global NAPs disagreed, and in due course presented the matter to the Rhode Island PUC for resolution. The PUC was presented with, but rejected, Verizon's claim that the February 1999 order relieved Verizon of its obligation to pay. It reached that result because it found that, within the meaning of the relevant provision, the issue was still open. Payment, therefore, was still required. Verizon neither sought a stay of, nor appealed, this ruling, and indeed is paying its reciprocal compensation bills for Rhode Island.[55]

99. Consequently, Verizon has no possible good faith basis to claim that the *Rhode Island Agreement's* compensation provision has "expired." Under the Rhode Island PUC's decision, it is perfectly clear what that provision means. ***It means that the Commission's February 1999 order did not resolve the matter, so that the issue is still open, so Verizon still has to pay.*** The PUC says this in absolutely unambiguous terms: the first sentence of the "Findings" section of its order is: "The [PUC] agrees with GNAPs that the issue of whether ISP Traffic constitutes 'local traffic' for which reciprocal compensation must be paid under the [interconnection agreement] ***was not resolved by*** the FCC's [February 1999 order]." *Rhode Island Order* at 4 (emphasis added). It says this again in its formal "ordering clauses" section:

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decide whether or not extrinsic evidence is required to assess the meaning of contractual terms, or whether, instead, the contract should be assessed based entirely on its own language.

[54] Verizon characterizes this in terms of the relevant provision "expiring." *See* Letter from M. Glover, Verizon, to A. Dale et al., FCC (August 23, 2000), attached hereto as Exhibit 7 ("*Glover Letter*"), at 2-3.

[55] A copy of the decision of the Rhode Island PUC (In Re Complaint of Global NAPs, Inc. Against Bell Atlantic-Rhode Island Regarding Reciprocal Compensation, *Report and Order*, Docket No. 2967 (R.I.P.U.C. Nov. 16, 1999) ("*Rhode Island Order*")) is attached as Exhibit 15. A review of this decision makes crystal clear that the precise issue Verizon is still whining about here was raised before, and decided adversely to Verizon by, the Rhode Island PUC.

"ORDERED: 1. The issue of whether ISP Traffic constitutes 'local traffic' subject to reciprocal compensation ***has not been resolved according to the terms of Section 5.7.2.3 of the parties' Interconnection Agreement.***" *Id.* at 5 (emphasis added).

100. In these circumstances, Verizon's claim that this provision means something else, and specifically, means exactly what the Rhode Island PUC said it ***didn't*** mean, is preposterous. The plain fact is that Verizon — in direct contradiction of its obligation under Paragraph 32 — is engaging in bad faith tactics to avoid extending ***the contract it agreed to in Rhode Island*** to other states, by denying that the interim payment provision means what it actually means.

101. Consequently, the Commission should rule here that Verizon may not, under Paragraph 32, dispute the interpretation of an interconnection agreement provision in State B (where a CLEC seeks to adopt it), when the meaning of that provision has already been determined in litigation in State A (the state in which it was originally negotiated)[56].

102. The Commission should make clear that it simply will not entertain any suggestions by Verizon that the disputed provision of the *Rhode Island Agreement* means anything other than what the Rhode Island PUC said it means. In other words, the Commission should make clear that the *Rhode Island Agreement* provides for compensation for ISP-bound calls until such time as the proper treatment of such calls is finally resolved by the appropriate regulators — and that Verizon is not entitled to pretend otherwise.

103. In opposing this conclusion, Verizon asserts that Global NAPs may not adopt the *Rhode Island Agreement* — at least not the provision relating to interim payment for ISP-bound

[56] Such a ruling would rely on well-settled principles of res judicata, collateral estoppel and issue preclusion. The Commission has previously ruled that these principles apply in its proceedings. *See TSR Wireless, LLC v. US WEST Communications, Inc.*, 15 FCC Rcd. 11166 (2000) at ¶¶ 14-17.

calls — because that provision supposedly "expired" upon the issuance of this Commission's February 1999 order. *See Glover Letter* at 3. Specifically, according to Verizon, "the Merger Conditions do not permit a carrier to adopt terms from an agreement 'beyond the last date that they are available in the underlying agreement,' *see* Conditions ¶ 32."

104. This is wrong for several reasons.

105. First, as discussed above, the Rhode Island PUC has authoritatively interpreted the provision in question and held that it did ***not*** "expire" in February 1999. Like the hypothetical "first Monday of each month" provision discussed above, even granting for purposes of discussion that the affected language could, arguably, have been read to mean that it "expired" once the February 1999 order was issued, it turns out that we know — because the Rhode Island PUC has told us — that the affected language does not, actually, mean that. To the contrary, the affected language "contained in Section 5.7.2.3 of the [agreement] ***clearly and unambiguously requires BA-RI to make reciprocal compensation payments to GNAPs pending the outcome of this docket***" (*i.e.*, while the PUC itself determines whether compensation is due). *Rhode Island Order* at 5 (emphasis supplied). There is no basis to sustain Verizon's pretense that it doesn't know what Section 5.7.2.3 means. This is no different than an ILEC claiming that it didn't really think that CLECs were entitled to cageless collocation, despite this Commission's decisions requiring it. *Cf.* In the Matter of GTE Service Corporation, *Order*, 15 FCC Rcd. 13946 (August 1, 2000) ("voluntary" fine of $2.7 million paid for violations of the Commission's cageless collocation rules).

106. Although this Commission need not even reach this question, lest there be any doubt, the Rhode Island PUC got the answer right. The purpose of the affected provision is to provide that Global NAPs actually gets paid for ISP-bound traffic while the question of whether

such payment is appropriate remains open. Both parties may have thought in the summer of 1998 that the question would have been resolved by this Commission in its order in the then-ongoing declaratory ruling proceeding. But the logic of this Commission's February 1999 order did not meet the parties' expectations. That is, that order did not, in fact, lay the matter to rest; instead, it held that the determination of whether ISP-bound calls were to be compensated under any particular agreement had to be made on a contract-by-contract basis by state commissions, until the Commission issued final rules. Since the question whether the agreement "on the merits" envisions compensation for ISP-bound calls had not yet been decided by the Rhode Island PUC (and still has not), payment is called for.[57]

107. Verizon is wrong on this point for another reason as well. Even if the Commission's February 1999 order ***did*** temporarily have the effect of suspending Verizon's payment obligations under the affected provision of the *Rhode Island Agreement* (which it didn't), Verizon is of course aware that that order was vacated. The matter was thus "open" again for the time period involved, just as it was when the contract was originally negotiated.[58]

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[57] As the Commission is aware, it also provided substantial guidance to state regulators regarding how to interpret the substantive terms of affected interconnection agreements to see whether they should be fairly read as including a compensation obligation. *See Reciprocal Compensation Ruling* at ¶ 24. While, as noted, the Rhode Island PUC has not yet resolved the question, Global NAPs is confident that application of the Commission's identified factors would lead to the conclusion that ISP-bound calls are compensable under the *Rhode Island Agreement.*

[58] The vacatur of the February 1999 order, as a matter of law, means that the order is of no force and effect, and that matters are as they would have been if that order had never been issued. To "vacate" means to annul; to cancel or rescind; to declare, make, or render void; to defeat; to deprive of force; to make of no authority or validity; to set aside. *Alabama Power v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994). As *Schurz Communications v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992), makes clear, when an agency order is vacated, the applicable regulatory rules and obligations, as a matter of law, bounce back to what they were prior to the effectiveness of the vacated ruling: If the court in that case "vacate[d] … the part of the [FCC's] order repealing the 1970 rules, [those prior] rules would spring back into effect." *See also Action on Smoking and*

….Continued

108. In this connection, Verizon blinks legal reality when it tries to read the impact of judicial review out of the affected provision. *See Glover Letter* at 3. The affected provision states:

> The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation mush be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 ***and may be before a court of competent jurisdiction.*** The Parties agree that the decision of the FCC in that proceeding, ***or as such court,*** shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. If the FCC ***or such court*** determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC ***or court determination***.

Rhode Island Agreement, § 5.7.2.3 (emphasis added). The parties were not so naïve as to think that the Commission's decision would not be appealed, and, therefore, expressly recognized that "a court of competent jurisdiction" could well get involved — as manifestly happened in *Bell Atlantic v. FCC.* The legal effect of the court's vacatur of the February 1999 order was to put things back where they were before that order was issued. So even if Verizon had a legitimate claim that it did not owe compensation under this provision during the reign of that order (which,

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Health v. CAB, 713 F.2d 795, 797 (D.C. Cir. 1983) (recognizing that vacating or rescinding regulations has the effect of reinstating prior regulations); *cf.* 49 C.J.S. Judgments § 357 (1997) ("Where a judgment is vacated or set aside by a valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered"). The recent adoption by the Commission of an order governing compensation for ISP-bound traffic *prospectively* (see News, Federal Communications Commission Resolves Carrier Compensation Rules for Internet Traffic (April 19, 2001), http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0114.html) does not affect the obligation of Verizon to pay retrospectively owed reciprocal compensation bills and future (albeit possibly reduced) amounts of reciprocal compensation.

again, the Rhode Island PUC has authoritatively determined is ***not*** true), it surely had no such claim under the vacatur.[59]

109. In fact, this entire Verizon argument misreads the part of Paragraph 32 referring to "the last date that [items] are available in the underlying agreement." As noted above, this part of Paragraph 32 does not actually apply to "provisions" of interconnection agreements at all; it literally applies only to "interconnection arrangements" or "UNEs," *i.e.*, it has a "technical" focus. But even if this part of Paragraph 32 is read to prohibit cross-border adoption of a literally "expired" entire interconnection agreement (or part of one), that does not help Verizon. The provision at issue here does not have a set termination date (other than the termination date of the contract in which it is embodied, *i.e.,* sometime in late 2001). It is simply a conditional contractual obligation: if X condition exists, then Y obligation exists. Here "X" is "the issue of compensation for ISP-bound calls is unresolved" and "Y" is "Verizon pays for ISP-bound calls." At some points over the life of the contract, "X" may be satisfied, in which case obligation "Y" attaches. At other points, "X" may not be satisfied, in which case Verizon is relieved of obligation "Y." This, again, was what the litigation before the Rhode Island PUC was about: did the issuance of the Commission's February 1999 order nullify condition "X," and, therefore, Verizon's obligation "Y"? And, again, the PUC found that payment was called for even in the face of this Commission's February 1999 order; it seems quite clear that payment is called for given that that order was vacated.

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[59] Verizon has suggested that Global NAPs should not have filed this complaint due to the Commission's recent announcement of a decision on remand regarding compensation for ISP-bound traffic. That could only be true if the Commission's order purports to retroactively overturn the impact of the specific intercarrier contracts, which does not appear to be the case. The impact of this as-yet-unreleased ruling on a prospective basis, of course, depends on the ….Continued

COUNT IV:

VERIZON'S REFUSAL TO ALLOW GLOBAL NAPS TO ADOPT THE *RHODE ISLAND AGREEMENT'S* RECIPROCAL COMPENSATION PROVISIONS VIOLATES 47 U.S.C. § 201(b)

110. Global NAPs hereby realleges and incorporates by reference paragraphs 1 through 109 of this Formal Complaint.

111. Section 201(b) of the Communications Act requires that all charges, practices, classifications, and regulations for and in connection with such communication services be just and reasonable and provides that any such charge practice, classification, or regulation that is unjust or unreasonable is unlawful. As earlier described, Global NAPs was entitled to adopt the reciprocal compensation provisions of the *Rhode Island Agreement*, as interpreted as of the time of adoption, in Virginia and Massachusetts pursuant to paragraph 32 of the Commission's *GTE Merger Conditions*. Verizon's limitation and conditioning of such adoption is a clear violation of a Commission Order and, hence, a per se unjust and unreasonable practice in violation of federal law. Global NAPs has attached a calculation of damages it has suffered as a result of this violation as Attachment D.

VI. REQUESTED RELIEF

112. **WHEREFORE**, the Commission should find in favor of Global NAPs and against Verizon and:

113. Under counts 1, 2 and 3, find that Global NAPs has adopted the *Rhode Island Agreement*, including Section 5.7.2.3, in Massachusetts and Virginia; that that section has the meaning given it by the Rhode Island regulators; and that, therefore, Verizon owes Global NAPs

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terms of the ruling and the terms of the parties' agreement – including whether it includes Section 5.7.2.3 or not.

reciprocal compensation payments from July 24, 2000 to the present for ISP-bound traffic in those states at the appropriate rate(s) based on the *Rhode Island Agreement*.

114. Under counts 1,2, 3, and 4, find that Verizon's conditioning and limitation of adoption of the *Rhode Island Agreement* in Virginia and Massachusetts constitutes a violation of 47 U.S.C. § 201(b) entitling Global NAPs to a payment of money under 47 U.S.C. § 209; and that Global NAPs is entitled to damages from Verizon in the amount of $26,871,153.92, the amount of reciprocal compensation Verizon owes Global NAPs for Global NAPs' transport and termination of Verizon-originated ISP-bound calls in Massachusetts and Virginia from July 24, 2000 through March 31, 2001.

115. For the reasons stated above, Global NAPs respectfully requests that the Commission grant it this requested relief.

Respectfully submitted,

GLOBAL NAPS, INC.

By:_____

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April 27, 2001

ATTACHMENT D:

CALCULATION OF DAMAGES

Global NAPs seeks damages from Verizon in the amount of $26,871,153.92. This amount represents the amount of reciprocal compensation Verizon owes Global NAPs for Global NAPs' transport and termination of Verizon-originated ISP-bound calls in Massachusetts and Virginia from July 24, 2000 through March 31, 2001.

That amount is calculated as follows:

Minutes of Compensable Traffic (July 24, 2000 through March 31, 2001)	X	Rate of Reciprocal Compensation under the *Rhode Island Agreement* (per minute)	=	Total Reciprocal Compensation

As applied to Virginia and Massachusetts, this formula yields the following calculations:

VIRGINIA (LATA 236)

Month	Minutes	X	Rate	=	Total Compensation
July (prorated 7/24-7/31)	19,058,493.16	X	$0.00800	=	$152,467.94
August	70,352,309.00	X	$0.00159	=	$111,860.17
September	77,735,720.00	X	$0.00159	=	$123,599.79
October	85,773,695.00	X	$0.00159	=	$136,380.17
November	83,361,103.00	X	$0.00159	=	$132,544.15
December	87,781,572.00	X	$0.00159	=	$139,572.69
January	100,414,687.00	X	$0.00159	=	$159,659.35
February	88,393,522.00	X	$0.00159	=	$140,545.70
March	93,213,428.00	X	$0.00159	=	$148,066.25
Total	**706,084,529.16**				**$1,244,696.21**

MASSACHUSETTS (LATAS 126,128)

Month	Minutes	X	Rate	=	Total Compensation
July (prorated 7/24-7/31)	100,442,958.70	X	$0.00800	=	$803,543.67
August	402,277,828.00	X	$0.00800	=	$3,218,222.62
September	386,448,810.00	X	$0.00800	=	$3,091,590.48
October	411,225,589.00	X	$0.00800	=	$3,289,804.71
November	406,910,649.00	X	$0.00800	=	$3,255,285.19
December	377,099,249.00	X	$0.00800	=	$3,016,793.99
January	376,155,846.00	X	$0.00800	=	$3,009,246.91
February	339,185,139.00	X	$0.00800	=	$2,713,481.11
March	403,561,129.00	X	$0.00800	=	$3,228,489.03
Total	**3,203,307,197.70**				**$25,626,457.71**

COMBINED TOTAL FOR VIRGINIA AND MASSACHUSETTS:

	Minutes		Total Compensation
	3,909,391,726.86		**$26,871,153.92**

Invoices documenting these amounts of reciprocal compensation are attached as Exhibit 17.